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ABSTRACT

This paper argues that in recent years the number of aliens being denied nonimmigrant visas to the United States because of their liberal political views has increased. The roles of each of the branches of government in the procedure of denying visas are reviewed. The number of visa denials in the lower courts has risen dramatically since 1980, suggesting an escalation of political control of information (i.e. speakers from abroad) since President Reagan's election. The denials are based on the authority of the Immigration and Naturalization Act (INA), but many instances are marked by judicial reliance on procedural issues rather than the constitutional rights involved. When Belgian journalist E. Mandel was denied entry to the United States in 1969 on the grounds of previous visa violations, the Supreme Court paid little attention to the public's constitutional right to hear him speak. Since then, others have been denied entry on the grounds that they are affiliated with anti-nuclear organizations, communist organizations, or women's rights groups. The judicial branch of the government is reluctant to make judgments in matters that overlap with the executive branch's powers. The U.S. government should conform to the levels of tolerance it demands of its citizens, in light of the First Amendment, and allow its citizens free and open discourse with aliens expressing dissenting beliefs. (JC)

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COVER YOUR EARS!

U.S. Impingement on the Right to Hear through Political Exclusion Provisions

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Presented at the Association for Education in Journalism and Mass Communication Convention, San Antonio, Texas, August, 1987

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Cover Your Ears!
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The woman appeared to be about 50 years old. She was dressed in the style of a lower-class Salvadoran widow -- black cardigan, black skirt, black stockings, and black shoes. Her posture told of a life of hard work and strife. She related how she had come to devote her time to an organization dedicated to locating and identifying the bodies of the desaparecidos -- victims of the ongoing civil war in her country. Her husband and son had been "disappeared" by the death squads that operated throughout El Salvador. She offered no political assessment, only condemned the violence that had turned the verb "to disappear" from the intransitive to the transitive. She was in the United States to receive an award from the Robert F. Kennedy Foundation for the humanitarian efforts of the organization she headed.

* * *

Handsome, with a bearing that reflected his years as an officer in his country's army, he stood before a dinner crowd to receive an award for his anti-communist activities in El Salvador. Thirteen conservative American political organizations had selected him for this honor. He was the outspoken leader of ARENA, the oligarchy-supported, rightist opposition party to the more centrist Christian Democrats in power. Before that, he had been the leader of the White Warriors Union, one of the death squads that "controlled" suspected subversives in El Salvador. Other credits included a stint as the chief of security for the Salvadoran National Guard. His reputation for torture in that position had earned him the nickname, Blowtorch Bob. A former U.S. ambassador to El Salvador would later describe him as a "pathological killer."[84]

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[4]Edward S. Herman and Frank Brodhead, Demonstration Elections: U.S.-Staged Elections in the Dominican Republic, Vietnam, and El Salvador (Boston, Ma.: South End Press, 1984),

As aliens[2], both of these individuals had to apply for a nonimmigrant visa to enter the United States. The application of one was issued with no extraordinary circumstances; the other's was denied. Only after public outcry at that denial and pressure from the Kennedy family was the decision reversed, and the woman destined to be honored for humanitarian efforts was allowed to travel to San Francisco to receive the award.[3]

As an excluded alien, Alicia Rivera joins the company of the following persons: Hortensia de Allende, Chilean human rights activist; Tomas Borge, Nicaraguan interior minister; Dennis Brutus, South African poet; Julio Cortazar, the late Argentine novelist; Bernadette Devlin, Irish nationalist, former member of Parliament; Dario Fo, Italian playwright; Carlos Fuentes, Mexican novelist; Gabriel Garcia Marquez, Nobel Prize-winning Colombian novelist; Yves Montand, French singer; Farley Mowat, Canadian author; Nino Pasti, former NATO general; and 320 Japanese delegates to the June, 1982 U.N. special session on disarmament.[4]

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p. 117.

[2]An alien is "any person not a citizen or national of the United States." Immigration & Nationality Act, Section 101, 8 U.S.C. Section 1101(a)(1980).

[3]Anthony Lewis, "The Big Chill," New York Times, November 29, 1984, p. 31. The organization that Alicia Rivera represented is the El Salvador Committee of Mothers. (In Spanish, it is the Comite de las Madres y los Parientes de los Desaparecidos.) Visa applications were made for four women to come to the U.S. to receive the award. Rivera was the only one whose visa denial was waived.

[4]"Bearers of Dangerous Ideas," Harper's 269 (June, 1984): p. 23. Others excluded include Ricardo Alarcon, former foreign relations minister of Cuba; Owen Carron, IRA leader; Mahmoud Darwish, Palestinian poet; Julio Barcia Espinosa, Cuban deputy cultural minister; Anna Margarity Gasteazora, Salvadoran opposition leader; Hector Oqueli, Salvadoran opposition leader; Trevor Monroe, Jamaican scholar and activist; Sam Nujoma, president of the South West African People's Organization (along with seven other SWAPO leaders); Franca Rama, Italian actress; Ernesto Sabato, Argentine author; Guillermo Ungo and Ruben Zamora, Salvadoran opposition leaders.

Interestingly, Roberto D'Aubisson, the other player in the scenarios above, has in the past been denied entry into the U.S. So has Ian Paisley, an Irish Protestant leader.[5] While the exclusion of these two political conservatives would seem to indicate some even-handedness in application of exclusion based on ideological considerations, the complete roster indicates a heavy preponderance of exclusions directed toward those espousing more liberal views.[6] Many of these individuals later were issued visas through a waiver process; often restrictions on the number of speaking engagements they could participate in or where they could travel were imposed.

Regardless of the ideological bent of their views, the fact that aliens are denied entry into the U.S. to express their political opinions seems in direct violation of the derivative constitutional right enjoyed by U.S. citizens to hear such views. This right has been affirmed in numerous cases by the Supreme Court, as will be demonstrated. However, in those cases both the speakers and the listeners were Americans. The judiciary's basis for permitting exclusion of alien speakers is its deference to the executive branch of government in foreign affairs matters, a deference founded in Congressional action authorizing the Executive to make decisions in that area. I contend that the interaction of the three branches of government, judicial, executive, and legislative, in creating this situation is an unwarranted violation of First Amendment rights of expression, particularly the

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[5]Ibid.

[6]Elizabeth Hull, Without Justice for All: The Constitutional Rights of Aliens (Westport, Ct.: Greenwood Press, 1985), p. 73.

"The groups hardest hit by the upsurge in visa denials are those concerned with peace in the world: nuclear freeze and disarmament groups, international solidarity organizations, socially concerned artists, church and women's groups." Political Denial of Visas Project of the National Lawyers Guild, Getting In: A guide to Overcoming the Political Denial of Nonimmigrant Vasas (New York: National Lawyers Guild, 1985), p. vii.

right to hear, and is an aberration in a long line of precedent.

This paper will look at the roles of each of the branches of government in the procedure of denying visas based on ideological grounds. Closer scrutiny will be given to the judiciary's role, including a discussion of the landmark case governing this issue, Kleindienst v. Mandel, et al.,[7] and some more recent cases, i.e., Abourezk, et al., v. Reagan,[8] Allende, et al., v. Schultz,[9] and Harvard Law School Forum, et al., v. Schultz.[10] Finally, a discussion of the two major issues, the right to hear and judicial deference to the executive branch in the area of foreign affairs, will be offered. It will become apparent that these considerations, one a constitutional right, the other a political tradition, are weighted very disproportionately in guiding the course of case law in this area.

Congressional and Executive Roles

Exclusion of aliens based on ideological grounds is accomplished by authority of the Immigration and Naturalization Act (INA), Section 212, subsections (27), (28), and (29). Relevant portions of those provisions read as follows:

> Except as otherwise provided in this chapter, the following classes of aliens shall be ineligible to receive visas and shall be excluded from admission into the United States:
>
> (27) Aliens who the consular officer or the Attorney General knows or has reason to believe seek to enter the United States solely, principally, or incidentally to engage in activities which would be prejudicial to the public interest or endanger the welfare, safety, or security of the United States.
>
> (28) Aliens who are, or at any time have been, members of the

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[7]408 U.S. 758 (1972)

[8]785 F.2d 1043 (D.C.Cir. 1986)

[9]605 F.Supp. 1220 (D.Mass. 1985)

[10]633 F.Supp. 525 (D.Mass. 1986)

following classes:

> (D) Aliens not within any of the other provisions of this paragraph who advocate the economic, international, and governmental doctrines of World communism or the establishment in the United States of a totalitarian dictatorship.
>
> (G) Aliens who write or publish, or cause to be written or published, or who, knowingly circulate, distribute, print, or display, or knowingly cause to be circulated, distributed, printed, published, or displayed, or who knowingly have in their possession for the purpose of circulation, publication, distribution, or display, any written or printed matter, advocating or teaching opposition to all organized government, or advocating or teaching * * * (v) the economic, international, and governmental doctrines of world communism or the establishment in the United States of a totalitarian dictatorship.
>
> (29) Aliens whom the consular officer or the Attorney General knows or has reasonable grounds to believe probably would, after entry, (a) engage in activities which would be prohibited by the laws of the United States relating to espionage, sabotage, public disorder or any other activity subversive to the national security, (b) engage in any activity, the purpose of which is the opposition to, or the control or the overthrow of the Government of the United States by force, violence, or other unconstitutional means, or...(c) participate in the activities of any organization which is...required to be registered under Section 7 of the Subversive Activities Control Act of 1950.

The INA was passed in 1952, at the height of McCarthyism. President Truman's veto of the bill was overridden,[11] and the McCarran-Walter Act, as the bill was known, became law. The INA, while being subjected to amendment through the years, has remained the governing law for immigration questions. The Immigration Act passed at the end of the 99th session of Congress will supplant certain parts of the INA; subsections (27)-(29), however, remain intact.[12]

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[11]Truman warned, "Seldom has a bill exhibited the distrust evidenced here for citizens and aliens alike." Cited in the Fund for Free Expression, et al., "Section 212(a)(28) of the Immigration and Nationality Act--The Case for Repeal," reprinted in the 36 Record of the Association of the Bar of the City of New York 297 (May-June, 1981).

[12]Department of Justice, Immigration and Naturalization Service, telephone interview with Officer Johnson, November 1986.

The history of American immigration policy dates back to the founding of the Republic. Maintenance of an open door policy was vital to providing the manpower needed for the expansion that characterized national policy during the late 18th and early 19th centuries.[13] However, the time came when it was necessary to heed the following advice given to Vice President Alben Barkley by Chief Ben American Horse of the Sioux Indian tribe: "Young fellow...[b]e careful with your immigration laws. We were careless with ours."[14]

With the exception of the Alien Act of 1798, which authorized deportation of any foreigner deemed to be dangerous to national security, the first restrictive immigration law came in 1875. Over the next 75 years, a number of classes of people, most notably Asians, were prohibited from entering the U.S. The first time that aliens were excluded based on their political beliefs was in 1903 when, in response to the shooting of President McKinley, any persons who believed in or advocated the overthrow of the United States government or all forms of law by force or violence were subject to exclusion.[15]

World War I and anti-German sentiment led to the passage of the Immigration Act of 1917. It required aliens to satisfy a literacy test. According to Hull,

> The act was passed amid the furor of World War I, and reflected the xenophobia that clouded the era. It banned not only illiterates and virtually every inhabitant of Asia, but also several other categories of aliens as well.[16]

The Immigration Act of 1917 remained in effect until replaced in 1952 by the INA. It was bolstered by the Anarchist Act of 1918 (a response to the Russian

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[13]Hull, p. 8.

[14]Cited in Hull, p. 7.

[15]Ibid., pp. 10-15.

[16]Ibid., p. 16.

Revolution), the National Origins Act that went into effect in 1929 and set quotas based on the number of annual visas allocated to any one country, and the Smith Act, also known as the Alien Registration Act, of 1940, which excluded any alien who was or had been a member of any organization advocating the violent overthrow of the government.[17]

The procedure set out in the INA for obtaining a nonimmigrant visa remains substantively unchanged today. It requires an alien to complete an application form for a visa. That form is reviewed by the consular officer in the country in which application is made. (This does not have to be the applicant's native country.) If an application is denied, review of that decision by the principal consular officer at a post is automatically required.[18] An appeal can also be accomplished by requesting an advisory opinion. This request can be made only by certain parties.[19] The advisory opinions are binding upon consular officers only when they concern an interpretation of law, as distinguished from an application of the law to the facts.[20] One of the weaknesses of the system is that only a small percentage of consular opinions are ever subjected to review;[21] therefore, there seldom are changes in denial decisions. The final possibility for overruling an exclusion is the Attorney

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[17]Ibid., p. 16.

[18]Edward B. Quist, "Justice for the Alien: The Adequacy of the Consular Issuance System,"7 Oklahoma City University Law Review 474 (Fall, 1982).

[19]According to Quist, ibid., p. 475, advisory opinions may be requested by a consular officer originally considering a case, a senior officer reviewing an application, a member of Congress, the visa applicant, an attorney or any other person with a bona fide interest in the case (e.g., a close relative, potential employer).

[20]Ibid.

[21]Ibid. "Consular officers were asked how frequently their supervising officer personally review their visa refusals. Only half said they were always reviewed, with thirty-two percent indicating review occurred either not very often or never."

General, who can overrule the decision and issue the visa anyway.

This was the procedure until 1977, when the McGovern Amendment (Section 112 of Public Law 95-105) ordered that waivers be universally granted to every alien who was ordered excluded because of membership in a prescribed organization.[22] Unless the Secretary of State certifies to the Speaker of the House of Representatives and the Chairman of the Senate Foreign Relations Committee that the admission of the alien would be contrary to the security interests of the United States, he is required to recommend to the Attorney General that a waiver be granted. This is to be done within 30 days of receiving an application for a nonimmigrant visa by an alien excludable because of such membership.[23]

(Note that this Amendment applies only to Subsection (28) of Section 212 of the INA. Congress considered and rejected this waiver procedure for subsections (27) and (29), a fact that will become significant in judicial deliberations in this matter.)

The McGovern Amendment came in response to one of the provisions of the Helsinki Final Act, to which the U.S. became a signatory in 1975. The purpose of that act is "to facilitate freer movement and contacts, individually and collectively, whether privately or officially among persons, institutions and organizations of the participating States, and to contribute to the solution of humanitarian problems that

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[22]David Carliner, "United States Compliance with the Helsinki Final Act: The Treatment of Aliens," 13 Vanderbilt Journal of Transnational Law 402 (Spring-Summer, 1980).

According to Carliner, ibid., p. 401, by 1975, 96 percent of those who were found excludable under Section 212(a)(28) were granted waivers of excludability and were approved for receipt of nonimmigrant visas.

[23]Ibid., p. 402.

arise in that connection."[24]Section III, known as Basket III, outlines specific steps to achieve this aim. They include the following:

> (4) facilitation of travel for personal or professional reasons;
>
> (6) encouragement of meetings among young people through educational exchanges, professional training, foreign language study, and youth programs; and
>
> (8) exchange of information in all fields of knowledge.[25]

As Carliner points out, the Soviet Union's and East European countries' non-compliance with this Act have received great attention. The United States' failure to eliminate barriers to travel and to promote family reunification, however, have not been scrutinized as closely.[26] In any event, the McGovern Amendment was a step toward compliance; however, instead of eliminating visa denials based on ideological grounds, it provided non-reviewable methods for excluding those whose views U.S. government representatives at the pinnacle or at the base of the bureaucratic hierarchy find objectionable, i.e., the government seemed to rely more

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[24]The Helsinki Final Act states as its goal "to facilitate freer movement and contacts, individually and collectively, whether privately or officially among persons, institutions and organizations of the participating States, and to contribute to the solution of humanitarian problems that arise in that connection." Final Act, Basket III, Section 1 preamble, para. 5.

[25]Other provisions include the following:

> (1) facilitation of travel by members of families in different countries;
> (2) reunification of family members by permitting emigration from the state of departure and immigration to the receiving state with "appropriate care with regard to employment for persons from other participating States who take up permanent residence in that State . . . and assurance that they are afforded opportunities equal to those njoyed by [signatories'] own citizens for education, medical assistance and social security";
> (3) grant of exit or entry permits to persons "who have decided to marry a citizen from another participating State";
> (5) promotion of tourism;
> (7) expansion of sports activity.

[26]Carliner, p. 399.

heavily on the vaguer and broader justifications found in subsections (27) and (29).[27]

Judicial Role

The power of the judicial branch of government is essentially limited through jurisdiction and deference, according to Widen.[28] Constitutional basis for federal judiciary jurisdiction[29] traditionally has been interpreted as a barrier to independent formulation of policy or establishment of rules of law.[30] In addition to the constitutional and statutory limitations, the doctrine of the political question[31] has restrained judicial intervention in certain areas.[32] While the basis for this doctrine

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[27]E.g., 705 F.2d 1043, 605 F.Supp. 1220.

[28]Darrell Widen, "Judicial Deference to Executive Foreign Policy Authority," 57 Chicago Kent Law Review 357 (Winter, 1981).

[29]U.S. Constitution, Article III, Section 2 sets out the jurisdiction of the federal judiciary:

The judicial Power shall extend to all Cases in Law and Equity arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority;--to all Cases affecting Ambassadors, other public Ministers and Consul;--to all Cases of admiralty and maritime jurisdiction;--to Controversies to which the United States shall be a Party;--to Controversies between two or more States;--between a State and Citizens of another State;--[and] between Citizens of different States.

[30]Widen, p. 357.

[31]The elements set out in Baker v. Carr (369 U.S. 186 (1962) are as follow: [A] textually demonstrable constitutional commitement of the issue to a coordinate political department; or a lack of judicially discoverable and manageable standards for resolving [the issue]; or the impossibility of deciding without an initial policy determination of a kind clearly for non-judicial discretion; or the impossibility of a court's undertaking independent resolution without expressing lack of the respect due coordinate branches of government; or an unusual need for unquestioned adherence to a political decision already made; or the potentiality of embarassment from multifarious pronouncements by various departments on one question.

[32]Ibid., p. 358.

is the constitutional mandate of separation of powers, Widen says, its application has been largely discretionary. The question asked by the courts when approaching an issue that may be subject to the political question doctrine is not whether they can exercise jurisdiction, but whether they will assume jurisdiction and adjudicate.[33] In application, according to Widen, the political question doctrine must be viewed as a doctrine of self-imposed judicial deference; it is not an absolute, as shown by the Court's reversal on the judiciability of the question of apportionment of Congressional districts.[34]

Immigration is one of the areas where the political question doctrine is the strongest. In case after case, the plenary power of the political branches, i.e., legislative and executive, over noncitizens has been deferred to by the courts.

> It is an accepted maxim of international law, that every sovereign nation has the power, as inherent in sovereignty, and essential to self-preservation, to forbid the entrance of foreigners within its dominion, or to admit them only in such cases and upon such conditions as it may see fit to prescribe.[35]

According to Hull, this doctrine has led the Supreme Court to effectively abdicate any responsibility toward aliens with regard to congressional or executive

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[33]Ibid. Widen gives the following example of the distinction between can and will:

In the case Colgrove v. Green, 328 U.S. 549 (1946), "the Supreme Court refused to grant relief for alleged discriminatory apportionment of congressional districts. In a plurality decision, the plurality stated that the 'appellants ask of this Court what is beyond its competence to grant.' (at 552) The plurality found that the express grant to Congress to deal with the apportionment of congressional districts precluded judicial intervention. (at 554-56) The Court in Baker v. Carr, 369 U.S. 186 (1962) departed from the reasoning in Colegrove by deciding that legislative apportionment was a justiciable issue. The Baker Court noted that '[t]he doctrine of which we treat is one of "political questions" not of "political cases." The courts cannot reject as "no lawsuit" a bona fide controversy as to whether some action denominated by "political" exceeds constitutional authority.'" (Ibid., pp. 358-59)

[34]Ibid.

[35]Nishimura Ekiu v. U.S., 142 U.S. 651, 659 (1892)

policies. It has yet to invalidate on substantive grounds federal policy that affects the rights of noncitizens.[36]

However, despite hesitancy to interfere in issues considered political questions in immigration and other areas, the courts have sometimes intervened in cases that call their fundamental role in U.S. society, to act as "an intermediate body between the people and the legislature"[37] into question. Stated in stronger terms, it is the obligation of the Court to resolve issues in which the rights of individuals are pitted against the asserted needs of the government,[38] and it has acted on such questions, despite their intrusion into areas usually reserved to the executive and legislative branches.[39]

The vital difference, then, between the line of cases under study here and the line of cases dealing with more general immigration questions is the right of individual Americans to hear the views that would be expressed by the aliens excluded from entering this country. This issue has been faced head-on only in dissenting opinions; in none of these cases did it influence the majority decision of the courts.

Kleindienst v. Mandel, et al.[40] (decided 29 June 1972)

Dr. Ernest Mandel is a Belgian journalist and author. He is a self-proclaimed revolutionary Marxist. In 1969 he was invited by Stanford University to speak at a

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[36]Hull, p. 148.

[37]Alexander Hamilton, "The Supreme Court, No. 78", The Federalist Papers (New York: Washington Square Press, 1964), p. 145.

[38]Hull, p. 149.

[39]E.g., New York Times Co. v. U.S., 403 U.S. 713 (1971)

[40]408 U.S. 753 (1972)

conference entitled "Technology and the Third World." He applied for a nonimmigrant visa, which was denied pursuant to Section 212, subsection (28) of the INA. While his application was being reviewed, Mandel received several other invitations to speak on college campuses during his trip to the U.S. He filed a second application to cover the dates of those engagements. His first application was denied. The Secretary of State refused to recommend a waiver, and the Attorney General refused to grant a waiver because of violations of visa restrictions during a visit by Mandel in 1968. Upon further review, the Secretary of State determined that Mandel had never been advised of the restrictions accompanying the issuance of the 1968 visa and recommended that a waiver be granted so Mandel could attend the conference. Relying on the "flagrant abuse" by Mandel during his previous visit, the Attorney General persisted in refusing to issue a waiver.[41] Eventually his second application was denied on the same grounds.

Suit was filed in district court, alleging that the provision barring Mandel from entering the U.S. violated the right of American citizens "guaranteed by the first amendment to meet with an alien for free and open academic discussions which cannot be preempted by the alien's exclusion where no legitimate purpose is served thereby."[42]

The government's case rested primarily on the plenary power of the legislature to restrict the entry of aliens and on the dichotomy of speech and action. While speech may be protected, the government's attorneys said, they were not restricting

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[41]Brief for United States (appellants) at 7, Kleindienst v. Mandel, 408 U.S. 753 (1972)

[42]Brief for Appellees at 14, Kleindienst v. Mandel, 408 U.S. 753 (1972)

Mandel's speech; they were controlling his action of entering the U.S.[43]

The district court found for the plaintiffs, Mandel and the academics who had invited him to speak at the universities they represented. The "et al." of the pleading heading really expresses the crux of the issue, for not even the plaintiffs claimed that Mandel, as an alien, had any right to speak; the right resided in the American citizens who were being denied the opportunity to hear him. "These citizens, the court found, suffered and were continuing to suffer irreparable injury as a direct result of the alien scholar's exclusion."[44]

> Such an executive discretion to invoke or suspend the operation of the general national power to exclude aliens may exist where the uses of the discretion do not impinge on interests protected by the First Amendment, but that it cannot exist here flows from the nature of the rights involved.[45]

The court stated that where a compelling governmental interest was proven, exclusion may be permissible. In this case, however, the government did not even attempt to show such an interest, relying instead on the two justifications outlined above.[46]

With time being of the essence, the case was appealed directly from the District Court for the Eastern District of New York to the Supreme Court. Upon review, the Supreme Court reversed the decision of the lower court by a 6-3 margin. Justice Blackmun delivered the opinion of the Court, which gave passing

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[43]The observation has been made that if preventing an alien from entering the U.S. in this situation is controlling action, the government would be justified in prohibiting domestic speakers by controlling their trip to the podium.

[44]Brief for Appellees at 2, Kleindienst v. Mandel, 408 U.S. 753 (1972)

[45]Brief for Appellees at 3, Kleindienst v. Mandel, 408 U.S. 753 (1972)

[46]"The only governmental interest embodied in that section (212(a)(28)) is the Government's desire to keep certain ideas out of circulation in this country. This is hardly a compelling governmental interest." (J. Marshall, dissenting) 408 U.S. 753, 784 (1972)

attention to the right to hear issue, but relied on "facially legitimate and bona fide" reasons for refusing to grant a waiver, i.e., Mandel's violation of conditions on prior visas.

> We hold that when the Executive exercises this power negatively on the basis of a facially legitimate and bona fide reason, the courts will neither look behind the exercise of that discretion, nor test it by balancing its justification against the First Amendment interests of those who seek personal communication with the applicant.[47]

The "facially legitimate and bona fide reason" standard became the legacy of Kleindienst. In his dissent, Justice Marshall, joined by Justice Brennan (Justice Douglas filed a separate dissent), expresses confusion:

> I do not understand the source of this unusual standard. Merely "legitimate" governmental interests cannot override constitutional rights. Moreover, the majority demands only "facial" legitimacy and good faith, by which it means that this Court will never "look behind" any reason the Attorney General gives. No citation is given for this kind of unprecedented deference to the Executive, nor can I imagine (nor am I told) the slightest justification for such a rule.[48]

Mandel's exclusion stood, a standard was established, and the landmark case involving Americans' right to hear anyone, regardless of their nationality, was decided on a procedural rather than a constitutional question.

Since Mandel in 1972, no cases dealing with the same issues have reached the Supreme Court. There have been a few, however, in the lower courts. The reason for a lack of activity in this area is probably the reduced number of exclusions as a result of the McGovern Amendment of 1977.[49] However, the National Lawyers Guild

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[47]Ibid., p. 770.

[48]Ibid., p. 777.

[49]"The record of actual refusals is small, not because of the liberal attitude of the United States Government, but because many of our members, as a matter of principle, consider it anathema to have to attest as to their political views and

has noted an increase in exclusions more recently:

> Since the election of Ronald Reagan as president in 1980, we have witnessed a grave escalation in the political control of information, especially of information concerning our government's foreign policy. Exclusion of foreigners who criticize U.S. policies, through the denial of visas, is one of the more blatant examples of information control.[50]

The following cases are all post-1980.

Abourezk, et al., v. Reagan[51] (decided 11 March 1986)

This case is a consolidation of three separate actions. In Abourezk, et al., Tomas Borge, the Minister of the Interior of Nicaragua was denied a visa to visit the U.S. to speak to a group of U.S. citizens--including former and present members of Congress, journalists, religious leaders, and university professors. Their reason for inviting Borge was to "meet face-to-face with a person whose knowledge and experience of Central American affairs cannot be disputed." Borge's application for a nonimmigrant visa was denied pursuant to Section 212, subsection (27) of the INA.

Cronin, et al., v. Schultz involved the visa denial of Nino Pasti. Pasti is a four-star general in the Italian Air Force who has served as the Italian Military Representative to the NATO Military Commission as well as Vice-Supreme Commander for Europe for Nuclear Affairs. His affiliation is now with the Lotte Per la Pace (Struggle for Peace), an anti-nuclear peace organization which, according to the Department of State, is an active participant of the World Peace Council, an organization whose members are considered excludable. Pasti was

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affiliations; thus many academics will not apply because they do not wish to place themselves in the position of signing declarations to this effect" (Laurie Sapper, General Secretary of the British Association of University Teachers, cited in The Fund for Free Expression, et al., p. 297.)

[50]The Political Denial of Visas Project, p. vii.

[51]785 F.2d 1043 (D.C. Cir. 1986)

invited to address public anti-nuclear rallies in the New England area. His visa was denied pursuant to Section 212, subsection (27) of the INA.

The third of these consolidated cases is the City of New York, et al., vs. Schultz. The Commission on the Status of Women, an agency of the City of New York, extended an invitation to two Cubans, Olga Finlay and Leonor Rodriguez-Lezcano. Several universities across the country also invited them to speak on their campuses. Again, they were denied entry to the U.S. based on Section 212, subsection (27) of the INA.[52]

Suit was filed in district court. The question of the right to hear was again avoided in favor of issues of statutory interpretation.[53] And, despite the government's contention to the contrary through reliance on the doctrine of the political question explained above, both the district court and the court of appeals determined they had jurisdiction over these matters.

At the district court level, the court relied on in camera inspection of three affidavits which proved to its satisfaction that the plaintiffs did pose a threat to the public interest or national welfare, safety, or security of the United States. The government's motion for summary judgment was granted.

On appeal, the court of appeals acknowledged its obligation to consider questions of statutory construction. However, it proceeded in a manner so as to avoid a consititutional confrontation, if possible to stop short of that point.[54] The case was remanded to the district court for further hearings on the statutory

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[52]Brief for Appellant at 10-11, Abourezk v. Reagan, 592 F.Supp. 880 (D.D.C. 1984), cited in Richard J. Bartolomei, Jr., "The Ideological Exclusion of Invited Aliens: Should the United States Require a Higher Level of Tolerance by Its Citizens Than It Must Demonstrate Itself?" 1 Georgetown Immigration Journal 63 (1985).

[53]785 F.2d 1043, 1053 (D.C. Cir. 1986)

[54]Ashwander v. TVA, 297 U.S. 288, 347 (1936) Brandeis, J., (concurring)

questions raised, with a strict warning regarding circumstances under which in camera inspection of documents would be accepted by the higher court.

Circuit Judge R. Bork's dissent in these cases confronts the right to hear. Citing a long line of cases,[55] he claims an unbroken line of decisions limiting the scope of judicial review in this area. However, he relies on immigration cases that do not involve the constitutional rights of American citizens, as do the cases under study. Bork denies that the government's decision to exclude is based on the content of the applicants' political beliefs, but rather on their connections with particular governments.[56] Finally, he dismisses the plaintiffs' argument that the broad discretion delegated to the Executive in subsection (27) violates principles of separation of powers, relying on the Court's repeated support of the legitimacy of broad and discretionary Executive power.[57]

Allende, et al., v. Schultz[58] (decided 1 April 1985)

Hortensia de Allende, the widow of former President of Chile, Salvador Allende, is an activist for restoration of democracy and termination of human rights abuses in Chile. Allende, in response to invitations for speaking engagements, applied for a nonimmigrant visa. Her application was denied pursuant to subsection (28) of Section 212 of the INA. Upon review, subsection (27) was added as a basis for the decision. (No waiver procedure is permitted under subsection (27).) A

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[55]785 F.2d 1043, 1075 (D.C. Cir. 1986)

[56]While Bork's distinction holds true for Borge, Finlay and Rodriguez-Lezcano, Pasti was not acting as an agent of the Italian government. Even if he were, Italy is a strong ally of the U.S.

[57]Zemel v. Rusk, 381 U.S. 3 (1964) at 17. Cf., New York Times Co. v. U.S., 403 U.S. 713 (1971)

[58]605 F.Supp. 1220 (D.Mass. 1985)

group of American citizens who claimed that the denial of Allende's visa application violated their First Amendment rights of free speech and association filed suit in district court. The government moved to dismiss the suit or, in the alternative, for summary judgment.

This case followed lines very similar to those of the Abourezk action. In this one, however, the judge refused to accept documents for in camera inspection. Chief Judge Caffrey stated,

> Although this Court is aware that there may be a point at which the theoretical ideals of the adversary system must bow to the practical necessities of preserving national security and international relations, that point has not been reached in this case.
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> * * *
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> The defendant's motion for summary judgment is denied, without prejudice to its renewal if defendants can produce unclassified material establishing, as a matter of public record, a "facially legitimate and bona fide" reason for their refusal to grant Mrs. Allende a visa.[59]

(It should be noted that in all of the above cases, the applicants eventually were granted waivers of their exclusions, largely in response to public pressure. The Political Denial of Visas Project of the National Lawyers Guild has come up with a list of specific suggestions as to how to effectively mobilize such pressure.)[60]

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[59]Ibid., p. 1226.

[60]See pp. 34-35.

Harvard Law School Forum, et al., v. Schultz[61] (decided 18 April 1986)

Zuhdi Labib Terzi was invited to participate in a debate on "Prospects for Peace in the Middle East" at Harvard University in Cambridge, Massachusetts. Terzi was the Permanent Observer of the Palestine Liberation Organization (PLO) at the United Nations and the highest ranking member of the PLO in the U.S. He applied for a visa to travel outside the 25-mile radius of the UN building, which is the territory in which the U.S. permits free travel for UN diplomats. His visa application was denied pursuant to Section 212, subsection (28). The Secretary of State refused to recommend to the Attorney General that a waiver be issued. His refusal was based on the U.S. desire to avoid any recognition of the PLO.

Suit was filed in district court by the sponsors, organizers and participants in the conference. They requested an injunction enjoining the Secretary of State from refusing to permit Terzi to travel to participate in the scheduled debate.

District Judge J. Skinner, in applying the Mandel standard, found the government's reason bona fide, but not facially legitimate. The Secretary's justification was directly related to the suppression of a political debate with American citizens and content-based. As such, Skinner said,

> [t]he Secretary's actions are completely at odds with the First Amendment's protection of political debate and our national commitment to the principle that debate on public issues should be uninhibited, robust and wide open, and that it may well include vehement, caustic, and sometimes unpleasantly sharp attacks on government and public officials. New York Times v. Sullivan, 376 U.S. 254, 270[62]

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[61]633 F.Supp. 525, 531 (D.Mass. 1986)

[62]633 F.Supp. 525, 531 (D.Mass. 1986)

Discussion

As Justice Marshall said in his dissent in Kleindienst, "I, too, am stunned to learn that a country with our proud heritage has refused Dr. Mandel temporary admission. I am convinced that Americans cannot be denied the opportunity to hear Dr. Mandel's views in person because their Government disapproves of his ideas."[63]

Justice Marshall reflects the reaction of many Americans when they hear, first, of the existence of a provision by which the government can sterilize debate by keeping people whose ideological views it finds unacceptable out of this country, and, second, that there may be no way for American citizens to contest such a decision.

Rights and procedure -- two elements that Americans assume are protected and, if they aren't, the situation will be remedied by judicial intervention. As this study indicates, that may happen, but thus far, it has been only on a case-by-case basis with heavy reliance on procedural issues rather than on the more important issue of the constitutional rights involved.

Those procedural issues alone raise serious questions about the validity of the provisions under examination. The process effectively has created a one-person (i.e., the consular officer) review of visa applications. "It has become a fundamental premise of our jurisprudence," according to Professors Jaffe and Hart, "that the decision of weighty matters should almost never be placed in the power of a single individual free from control of a superior reviewing body.[64] While the McGovern Amendment attempted to address this issue, it did so for only one of the

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[63]408 U.S. 753, 755 (1972)

[64]Cited in "Judicial Review of Visa Denials: Reexamining Consular Reviewability," 52 New York University Law Review 1137 (November, 1977). See also Lovell v. Griffin, 303 U.S. 44 (1938).

subsections, and as shown by the cases discussed above, with limited success.

Cases through the years have shown the hardships created by this review system, from families having to live apart[65] to persons suffering the humiliation of being told that their political views are not welcome in the United States. This brand of arrogance is intolerable when directed at anyone, and sadly ironic when the targets include such notable figures as Gabriel Garcia Marquez and Carlos Fuentes.

As shown, the judiciary's hesitancy to tread on turf traditionally delegated to the other branches of government is self-imposed rather than constitutionally imposed, and has never been an absolute. It has been pointed out that this deference was born in an era of extraordinary judicial deference to the executive branch and nurtured by a theory of sovereign power that was overextended.[66] From the Chinese Exclusion Act to the rights of the children of illegal aliens to participate in educational opportunities in this country, the courts have shed their cloak of deference when circumstances demanded. Those circumstances have been diverse, ranging from public outcry (the catalyst for consideration of many of the cases dealing with illegal aliens) to threats to the commerce clause of the Constitution (the basis for the Chinese Exclusion Act[67]). New York Times Co. v. U.S.[68] is an example of the Supreme Court's treading on Executive prerogative in the area of foreign affairs. The parallels between the Pentagon Papers case, as it is commonly known, and the cases under study here are twofold: both involve

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[65]E.g., United States ex rel. Ulrich v. Kellogg, 30 F.2d 984 (D.C. Cir. 1929); United States ex rel. Knauff v. Shaughnessy, 338 U.S. 537 (1950).

[66]"Judicial Review of Visa Denials," p. 1173.

[67]Ibid., p. 1144.

[68]403 U.S. 713 (1971)

questions of the executive's handling of foreign affairs (insofar as immigration policy from a domestic perspective is emigration policy from an external point of view), and both involve the rights of American citizens to receive informaton concerning the issue. The opinions filed by the justices regarding the New York Times' publication of the Pentagon papers, while in some cases bemoaning the hastiness of their action, never suggested that they believed they had no right to review the case.[69]

An interesting analysis of the levels of toleration demonstrated by two cases has been made by Richard Bartolomei. While both would be recognized as reflecting freedom of expression issues, other links are not so apparent. However, Bartolomei contends that the inconsistency of the U.S. government in demanding a greater tolerance of its citizens than it offers itself is intolerable.[70] In Village of Skokie v. National Socialist Party[71] and Collin v. Smith[72] Jewish residents of Skokie, Illinois, were forced to tolerate a march by members of a Nazi organization. As Bartolomei states,

> One would assume that if the Nazis had a right to march through a Jewish community, then the government was demanding a high level of tolerance from that community by subjecting a predominantly Jewish population to unwelcomed ideas. It seems that where there are legitimate first amendment rights asserted by United States citizens, those citizens should be allowed to demand the same level of tolerance from the government. The government should neither be allowed to deny entry to Nino Pasti solely because he will speak on the evils of the nuclear weapon, nor to

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[69]Ibid., see especially J. Burger's dissenting opinion.

[70]Bartolomei, p. 80.

[71]373 N.E.2d 21 (Ill. 1978)

[72]578 F.2d 1197 (7th Cir. 1978)

> Tomas Borge because he disagrees with the policies of the United States. Instead, the government should necessarily be as tolerant as it requires its citizens to be.[73]

A high level of tolerance for unpopular, adversarial views is a *cornerstone* of freedom of expression in the U.S., both in theory and application. Alexander Meikeljohn, one of the most influential First Amendment theorists of our time advanced the notion that any and all political speech is absolutely protected as vital to an informed citizenry, an element necessary for democracy to function.[74]

> [W]hen we speak of the (First) Amendment as guarding the freedom to hear and to read, principle applies not only to the speaking or writing of our own citizens but also to the writing or speaking of every one whom a citizen, at his own discretion, may choose to hear or to read. And this means that unhindered expression must be open to non-citizens, to resident aliens, to writers and speakers of other nations, to anyone, past or present, who has something to say which may have significance for a citizen who is thinking of the welfare of this nation. The Bible, the Koran, Plato, Adam Smith, Joseph Stalin, Gandhi, may be published and read in the United States, not because they have, or had, a right to be published here, but because we, the citizen-voters, have authority, have legal power, to decide what we will read, what we will think about.[75]

While Meikeljohn speaks here of the right to read the views of anyone, it is not a big leap to the right to hear those views. In Kleindienst, the court dismisses the government's contention that Mandel's physical presence in this country is superfluous because his views can be found in publications: "This argument overlooks what may be particular qualities inherent in sustained, face-to-face debate, discussion and questioning. While alternative means of access to Mandel's

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[73]Bartolomei, p. 77.

[74]Alexander Meikeljohn, "The First Amendment Is an Absolute," Supreme Court Review 245-266 (1961).

[75]Id., "Testimony on the Meaning of the First Amendment," in Cynthia Stokes Brown, ed., Alexander Meikeljohn: Teacher of Freedom (Berkeley, Ca.: Meikeljohn Civil Liberties Insitute, 1981), pp. 240-41.

ideas might be a relevant factor were we called upon to balance First Amendment rights against governmental regulatory interests...we are loath to hold on this record that existence of other alternatives extinguishes altogether any consitutional interest on the part of the appellees in this particular form of access."[76]

References to the importance of "free and unfettered" debate of political issues are so prevalent as to be almost boilerplate material in freedom of expression cases. And, as Justice Marshall points out,

> The freedom to speak and the freedom to hear are inseparable; they are two sides of the same coin. But the coin itself is the process of thought and discussion. The activity of speakers becoming listeners and listeners becoming speakers in the vital interchange of thought is the "means indispensable to the discovery and spread of political truth." Whitney v. California, 274 U.S. 357, 375[77]

With this "raging" consensus on the importance of the right to speak and the right to hear, how, then, do subsections (27), (28), and (29) of Section 212 continue to exist? Despite proposed legislation that would limit the breadth of subsections (27) and (29),[78] Congress has not acted to change U.S. policy on this matter. This failure to act can be blamed on a perceived unimportance of the issue, a result of a minimum of public pressure to change it. In order for the right to hear under the circumstances embodied in the cases discussed here to become an agenda item, public awareness of the problem will have to become much greater. Unfortunately, arousing sympathetic public interest in the problems of aliens has never been easy in the U.S.

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[76]408 U.S. 753, 765 (1972)

[77]Ibid.

[78]The Political Denial of Visas Project, p. 27.

It is also true that changing these provisions runs foursquarely counter to a central tenet of sovereignty, i.e., that every nation has the right to exclude from its territory any and all whom it chooses, for any reason it chooses,[79] and the plenary power that has been designated to the legislative and executive branches to govern this issue. Government arguments in immigration cases rely on Justice Frankfurter's remarks in Galvan v. Press:

> In light of the expansion of the concept of substantive due process as a limitation upon all powers of Congress, even the war power . . . much could be said for the view, were we writing on a clean slate, that the Due Process Clause qualifies the scope of political discretion heretofore recognized as belonging to Congress in regulating the entry and deportation of aliens . . .
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> But the slate is not clean. As to the extent of the power of Congress under review, there is not merely "a page of history" -- but a whole volume. We are not prepared to deem ourselves wiser or more sensitive to human rights than our predecessors, especially those who have been most zealous in protecting civil liberties under the Constitution.[80]

In the case of the denial of visas based on ideological grounds, however, it is recognized that we are dealing with a slate that is not clean. That does not, however, mean that mistakes on the slate should not be corrected. According to David Weissbrodt, a professor specializing in immigration law, there are signs of

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[79]Hull, p. 154.

[80]347 U.S. 522, 530-532 (1954)
Hull comments on the Frankfurter passage:

> As Gerald Rosberg points out, Frankfurter's words are ironic because in recent decades the Court has repeatedly shown itself willing to "deem [itself] wiser or more sensitive to human rights than [its] predecessors." ("Protection of Aliens from Discriminatory Treatment by the National Government," Supreme Court Review, p. 323) The entire equal protection revolution that began in full force in the 1950s is largely a repudiation of past doctrine. Just one week before Justice Frankfurter made the above statement, in fact, he was a member of a unanimous court that in Brown v. Board of Education (347 U.S. 483 (1954)) upset a major consitutional principle that had reigned for half a century. (p. 150)

serious movement toward change in this area. An assessment of the United States' conformance with the Helsinki Final Acts will be made in the coming year; visa exclusions are sure to be strongly condemned. The acts have proved an embarrassment to the State Department on a number of occasions.[81] If the impetus for change comes from the branch of government that has traditionally claimed authority over the issue, perhaps there is some hope. Until such time, however, the judiciary provides the only relief for American citizens who are "unquestionably aggrieved by the State Department's resort to subsection (a)(27) to keep out people they have invited to engage in open discourse with them within the United States,"[82] and suffer irreparable harm due to a loss of First Amendment freedoms.[83]

Whether the U.S. decides to conform to its own standards of freedom of expression, to the level of tolerance that it demands of its own citizens, and to the requirements of international law with regard to its policies permitting exclusion based on ideological grounds will indicate its commitment, or lack thereof, to the values that undergird the entire democratic system in this country.

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[81]David Weissbrodt, interview at the University of Minnesota School of Law, November 1986.

[82]785 F.2d 1043, 1051 (D.C. Cir. 1986)

[83]633 F.Supp. 525, 530 (D.Mass. 1986)